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NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Uttecht seeks review of the Ninth Circuit's opinion that grants a writ of habeas corpus and vacates Brown's sentence of death. Brown presents two arguments in opposition to Uttecht's petition. First, Brown presents the incredulous argument that the Ninth Circuit's decision, even though it vacates Brown's sentence of death, and requires the state court to either conduct a new penalty phase trial or re-sentence Brown to life imprisonment, is somehow not a final judgment in this habeas corpus proceeding. Second, Brown attempts to recast the Ninth Circuit's decision. Brown argues the Ninth Circuit did not ignore an implicit finding of fact by the state court, but actually recognized the existence of this finding. Brown further argues the circuit court determined that Brown had rebutted this factual finding by clear and convincing evidence. Neither of Brown's arguments is well taken.

The Ninth Circuit's decision constitutes a final judgment. The decision grants Brown a writ of habeas corpus and terminates the habeas corpus proceedings. The policy cited by Brown for deferring review of non-final decrees does not apply in this case. And, contrary to Brown's arguments, the Ninth Circuit applied an incorrect legal standard in granting relief. The Ninth Circuit failed to apply the law established by statute and this Court's precedent because the circuit court ignored the state court's implicit determination of the critical factual issue, and failed to give proper deference to the state court's adjudication of federal law. The Court should grant the petition for a writ of certiorari, and summarily reverse the decision of the Ninth Circuit.

ARGUMENT

1. The Ninth Circuit's Opinion Is A Final Judgment, Granting Habeas Relief And Vacating Brown's Sentence Of Death.

Brown argues the Court should not exercise its jurisdiction to grant the petition for a writ of certiorari because the Ninth Circuit's opinion is somehow not a final judgment. Brown argues that, because the Ninth Circuit did not reach his claim that counsel provided ineffective assistance during the penalty phase trial, the Ninth Circuit's decision vacating his sentence is not a final decree. Brown's incredulous argument misstates the law and the facts, and should be disregarded.

The Ninth Circuit's opinion constitutes a final judgment in this case. The court directed the issuance of a writ of habeas corpus, thereby vacating Brown's sentence of death. Pet. App. at 23a. The decision gives Brown the ultimate relief requested in his appeal. Under the Ninth Circuit judgment, the state court must either conduct a new penalty phase trial or re-sentence Brown to life imprisonment without parole (the only alternative sentence allowed under Washington law for a conviction of aggravated murder). Pet. App. at 23a. Other than the ministerial issuance of an order by the district court, there is nothing left to be done in federal court under the Ninth Circuit's ruling. Contrary to Brown's assertions, the Ninth Circuit's decision is a final judgment subject to review by this Court. The policy cited by Brown for deferring review on interlocutory decrees simply does not apply in this case.

A State suffers severe prejudice whenever a federal court grants habeas corpus relief to overturn a judgment of a state court. Under Brown's argument, however, the State would not have the opportunity to seek redress unless the circuit court resolved every claim raised by the habeas corpus petitioner on appeal. In fact, under Brown's argument, a circuit court could shield from review its decisions in a habeas corpus proceeding simply by granting the writ based upon one claim and declining to reach other claims. Under Brown's argument, review would never be proper since the judgment was not "final" and the alleged error not considered by the circuit court could always be rendered moot by a new trial in state court. Brown's proposal would not serve the interests of justice, and would in fact conflict with the principles of comity and federalism which underlie habeas corpus actions.

Brown also omits an important fact when he asserts that the unresolved claim of ineffective assistance renders the Ninth Circuit's decision a less than final judgment. Although Brown suggests the Ninth Circuit might rule in his favor on the claim of ineffective assistance of counsel, he omits the fact that every court to have considered the claim has rejected it. The state court denied the claim in Brown's personal restraint petition proceedings. *In re Brown*, 143 Wash.2d 431, 449-51 and 456, 21 P.3d 687 (2001). The district court also denied the claim after conducting an extensive evidentiary hearing. Pet. App. at 79a-89a. Brown's claim of ineffective assistance of counsel does not prevent review of the Ninth Circuit's opinion granting a writ of habeas corpus.

2. The Ninth Circuit Applied An Erroneous Standard In Granting Habeas Corpus Relief.

Brown argues the Ninth Circuit stated the correct rule of law and properly applied that rule to the facts of this case. Brown is mistaken.[1]

The Ninth Circuit did cite to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Gray v. Mississippi*, 481 U.S. 648 (1987) and *Wainwright v. Witt*, 469 U.S. 412 (1985) for the rule that improper removal of a juror for cause will entitle the defendant to a new trial. However, the Ninth Circuit failed to apply the remaining elements of this rule. The Ninth Circuit failed to apply the rule that a trial judge's decision to remove a juror, especially in the absence of a defense objection, constitutes an implicit factual determination that the juror was substantially impaired in the ability to perform the duties of a juror. *Witt*, 469 U.S. at 429-30; *Darden v. Wainwright*, 477 U.S. 168, 175-78 (1986). The Ninth Circuit failed to apply the rule that a federal court, when reviewing the decision to remove a juror, must presume correct the state court's implicit determination that the juror was substantially impaired. *Witt*, 469 U.S. at 429. And the Ninth Circuit failed to apply the rule that a petitioner must

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[1] Brown writes it is "notable" that Uttecht's petition left out a pertinent discussion from the Ninth Circuit's decision. Br. Opp. at 8 (citing Pet. App. at 13a-14a.). Actually, the petition quoted from this discussion. Pet. at 11-12. What is notable is that the Ninth Circuit never stated that Brown had rebutted by clear and convincing evidence the state court's finding of fact that Mr. Deal was substantially impaired.

rebut such a state court finding of fact by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In an attempt to save the Ninth Circuit's decision, Brown recasts the Ninth Circuit's reasoning by indirectly suggesting that the circuit court did recognize the existence of the state court's finding of fact concerning Juror Deal's substantial impairment, but found that Brown had rebutted any such state court finding of fact. Br. Opp. at 7-10. However, the panel majority never recognized the existence of the state trial judge's implicit finding. Contrary to Brown's suggestion, the Ninth Circuit expressly concluded that the state court made no such finding of fact concerning Juror Deal. Pet. App. at 13a-14a (determining that, unlike jurors X and Y, the state court never found juror Z was substantially impaired in his ability to follow instructions). If one never recognizes the existence of a fact, one cannot rebut the fact. Since the Ninth Circuit never recognized the existence of the state court's finding of fact concerning Mr. Deal, the circuit court never required Brown to rebut the finding by clear and convincing evidence. The Ninth Circuit failed to apply the rule in *Witt* and *Darden*, and the circuit court failed to apply the presumption of correctness imposed under 28 U.S.C. § 2254(e)(1).

Brown also argues the Ninth Circuit correctly disregarded any state court finding of fact concerning Mr. Deal because the state court record (*e.g.*, the trial transcript) does not support such a finding. Br. Opp. at 7-9. This is not the proper standard of review under 28 U.S.C. § 2254(e)(1). Unlike the prior version of the habeas statute, the statutory presumption of correctness for state court findings of

fact is now unconditional. The current statute eliminated the exceptions to the presumption of correctness listed in former 28 U.S.C. § 2254(d), including the exception that allowed the federal court to disregard a state court finding of fact if the finding was not supported by the record. *Compare*, current 28 U.S.C. § 2254(e)(1) and former 28 U.S.C. § 2254(d). The statute now simply declares "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The federal courts must apply the presumption of correctness until the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Assuming Brown is correct that the Ninth Circuit recognized the factual finding, but disregarded the finding because it was not supported by the record, the circuit court applied the incorrect statutory standard for reviewing a state court finding of fact. The Ninth Circuit applied the incorrect law because the court did not require that Brown rebut the state court's finding by clear and convincing evidence.

Brown argues the Ninth Circuit's decision does not conflict with the circuit court decisions cited in Uttecht's petition because the court, like the other circuits, required Brown to rebut the finding of fact by clear and convincing evidence. Br. Opp. at 10-12. However, the Ninth Circuit never recognized the existence of the state court finding of fact, and never required Brown to rebut the finding by clear and convincing evidence.

Finally, Brown argues the Ninth Circuit could disregard the state court's factual findings in this case because "the record makes it unmistakably

clear" that Mr. Deal was not substantially impaired. Br. Opp. at 12. In doing so, Brown asserts the unique rule adopted by the Ninth Circuit; that a federal court need not give deference to a state trial judge's determination if the circuit court believes the trial transcript reflects the "witness's clear words." Pet. App. at 17a n.8. This rule directly conflicts with the holdings of this Court.

The trial judge's observations of credibility and demeanor play an important role in interpreting what the Ninth Circuit described as Mr. Deal's "clear words." The fact is that prospective jurors "may be unable to articulate, or may wish to hide their true feelings." *Witt*, 469 U.S. at 425. "Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying." *Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984). "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Reynolds v. United States,* 98 U.S. 145, 156-157 (1879). "This is why deference must be paid to the trial judge who sees and hears the juror." *Witt*, 469 U.S. at 426.

The trial judge has the singular opportunity to assess each juror's demeanor, inflection, and credibility during the voir dire process, placing that judge in a position far superior to the reviewing courts to determine the "real character" of the prospective juror's impartiality. *Patton*, 467 U.S. at 1037-38 & nn.12 & 14. The Ninth Circuit's standard that accepts the cold record of the appellate transcript over the observations of the trial judge

fails to give the proper deference to the state court's finding of fact. *Rice v. Collins*, 126 S. Ct. 969, 974-76 (2006). The Ninth Circuit's willingness to disregard the trial judge's ability to view demeanor and credibility, in favor of the cold record, conflicts with the holdings of this Court and other circuit courts. *See, e.g., Darden*, 477 U.S. at 178 (quoting *Witt*, 469 U.S. at 424); *Kinder v. Bowersox*, 272 F.3d 532, 543 (8th Cir. 2001); *Clemmons v. Luebbers*, 381 F.3d 744, 756 (8th Cir. 2004); *Martini v. Hendricks*, 348 F.3d 360, 363-68 (3rd Cir. 2003). Contrary to Brown's arguments, the Ninth Circuit did not recognize the state court finding of fact, and the circuit court did not require Brown to rebut the finding with clear and convincing evidence.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED.

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